DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

CA 04-1183

MAY 17, 2006

APPEAL FROM THE BAXTER COUNTY CIRCUIT COURT
[NO. J-2002-131-2]

HONORABLE GARY BERT ISBELL, JUDGE

AFFIRMED

MARY NELSON BOGACHOFF
APPELLANT

V.

ARKANSAS DEPARTMENT OF HUMAN SERVICES
APPELLEE

Appellant Mary Nelson Bogachoff appeals the termination of her parental rights to two of her children, BN and JN, as found by the Baxter County Circuit Court. BN was born in September 1991, and JN was born in July 1996. The children were removed from appellant's custody on April 16, 2001, and the order terminating her parental rights was entered on February 6, 2004, from which she filed a timely notice of appeal. There were two older siblings involved in the case plan during portions of time relevant to this appeal: appellant's teenage step-son DN born in 1986 and appellant's daughter KN born in 1989. DN was placed in his father's custody, and KN was placed in appellant's custody. DN, KN, and the natural father of the four children, Darrin Nelson, are not part of this appeal, except as they relate to the evolution of this case pertinent to BN and JN.

Appellant lodges four points in her brief on appeal: (1) that the trial court erred in failing to recuse; (2) that the trial court clearly erred in terminating her parental rights because she completed the requirements of her case plan; (3) that the trial court clearly erred in terminating her parental rights because it did not consider placement with the maternal

grandfather; and (4) that the trial court clearly erred in terminating her parental rights because the trial court based its decision on the special needs of BN and JN instead of appellant's ability to parent. The Department of Human Services (DHS) and the children's attorney ad litem have filed briefs in opposition to appellant's arguments on appeal, asserting that there is no reversible error. We affirm.

The history of this case is as follows. This particular case plan arose in Washington County, Arkansas, where all parties resided. All four children came into DHS custody in April 2001 when they were found in the custody of their father (appellant's ex-husband), who had a drug charge against him. The children were infested with head lice, and their medications were not filled or taken. DHS instituted services including parenting classes, therapy, psychological evaluations, transportation, supervised visits, medical and foster care, and the like. At that time, the case was characterized as a family in need of services (FINS) case. In mid-June 2001, there was a trial placement of BN and JN with their paternal grandparents in Washington County, but the grandparents had trouble controlling the children and asked that DHS take over custody of them after two weeks. DHS placed BN and JN back in separate therapeutic foster care settings. DN was placed in his father's custody. Appellant was ordered to attend individual counseling, attend supervised visitation with KN and BN but not with JN, participate with BN's therapy as directed, submit to drug screens, and maintain stable housing and employment.

After a February 2002 review hearing, KN was permitted to try living with her mother, commencing in March 2002. Also, appellant was allowed to resume supervised visits with JN once a month. Supervised visits with BN at her therapeutic foster home in Fayetteville were continued, twice monthly. Appellant's case plan requirements remained

essentially the same, with the proviso that she ensure KN was taking her medication and attending counseling.

After a June 2002 review hearing, KN's placement with her mother was formalized in a court order, DN continued to be placed with his father and was dismissed from the case, and BN and JN remained in separate foster homes. However, appellant was allowed to have BN in her home for visitation for four-day visits twice per month. Visitation with JN continued to be supervised at his foster home. In August 2002, the case was transferred to Baxter County upon appellant's motion because appellant moved to Mountain Home, Arkansas, located in Baxter County. An attorney ad litem was appointed to represent the children's interests.

The first hearing in Baxter County Circuit Court was conducted in October 2002. Eleven-year-old BN and six-year-old JN remained in separate therapeutic foster care situations, KN was in her mother's custody in Mountain Home, and DN was in his father's custody in Fort Smith. Appellant was exercising visitation with BN in her home and with JN at his therapeutic foster home, but each child had emotional regression and outbursts after each visit, JN more so than BN. Appellant agreed that they needed family and individual therapy, and she needed help with having the children integrated back into her home, as she had with KN. The goal for BN and JN was for reunification with their mother, and the goal for KN was family preservation with her mother. Homemaker services were provided by DHS.

In November 2002, appellant was allowed to try having BN back in her home, which ended when BN needed to be checked into a mental health facility. BN was reportedly left unsupervised frequently while in appellant's custody, leading to her being suspected in a break-in at a church and leading to her being exposed to a known sex offender.

In December 2002, appellant was allowed a trial placement of JN in her home, which lasted no more than six weeks. JN's diagnoses include intermittent explosive disorder, adjustment disorder with disturbance of conduct, ADHD with predominantly hyperactive impulse type, and learning deficiencies requiring speech and occupational therapy. He had made educational progress in foster care, but it quickly deteriorated in appellant's custody to the point that JN was facing being placed in the alternative classroom and being assigned to the special education transportation if his behavior persisted. The caseworker described appellant's home as very chaotic and unstructured with a variety of people coming and going. School personnel, appellant, and DHS personnel met to address JN's emotional and educational regression. Appellant reportedly called JN's former foster parent to see if she could take him for the upcoming summer so she could "have a life." JN was not taking his hyperactivity and night-time sleep medications as prescribed. JN was exhibiting severe temper tantrums, striking appellant and his sisters, destroying home decor, and screaming obscenities. Appellant suggested that she be allowed to spank JN. On February 3, 2003, appellant was asked to undergo a drug screen, which she refused because she admitted using marijuana. On February 4, 2003, DHS took JN back to his therapeutic foster care home. His behavior markedly improved thereafter.

KN was approximately thirteen years old at this time, and her situation living with appellant was not ideal, given KN's depression, hostility, acts of self-mutilation, and her having been expelled from school. Appellant allowed KN to date an eighteen-year-old boy, and it was rumored that KN was smoking cigarettes and marijuana. KN's therapist expressed concern about KN's depression, appellant's efforts to thwart therapy, and KN's need for structure.

After these changes asserted by DHS with regard to JN, BN, and KN, DHS asked that the case be changed to a dependency/neglect case by a filing entered in mid-February 2003. In March 2003, appellant asked permission for KN to attend a school provided by Youth Bridge in Benton County, given that she had been expelled from school. Her request was granted.

The circuit court conducted a review hearing in March 2003, and as a result it granted DHS's request that the case be considered one for dependency/neglect. BN and JN were determined to have mental instabilities that could not be addressed in the home. KN was permitted to remain in her mother's custody with a protective services case open to ensure her safety and welfare. Appellant's own testimony was that KN (13), BN (11), and JN (6), were high maintenance children, although BN and JN's needs far exceeded KN's. Appellant agreed that she needed the parenting classes she took, but she said she had bettered herself as a parent and had long since quit using drugs. She said she moved to Mountain Home for a marriage in 2001, but it only lasted two years. The judge noted that appellant had moved residences numerous times in the last year and a half, including Fayetteville, Gasville, Mountain Home, and Bentonville, which was an impediment to providing the children stability.

In April 2003, the Baxter County circuit judge ordered DHS to do a home study on appellant's father's home in Missouri, but for her father to reimburse DHS for the travel expenses related to the study. In June 2003, a permanency planning hearing was conducted in which KN was found to no longer need services, but the same was not true for BN and JN. The goal of the case remained reunification, but with the father instead of the mother because he had made some progress toward providing stability. DHS was relieved from providing services to appellant mother. KN was dismissed from the case upon providing proof that she

was enrolled in Youth Bridge and home school. The case was tentatively transferred to Sebastian County, where the father, JN, and BN were residing. In a petition filed in August 2003, appellant complained that though she agreed to all the orders entered from the June 2003 hearing, it was upon condition that the case be transferred to Washington County, not Sebastian, a fact not borne out by the record. In late September 2003, appellant amended her petition, seeking reunification services to be reinstated because she had completed all case plan requirements, had proven she could be a good mother, had good progress with KN, had acquired a spacious home close to the schools, and had extended family assistance for child care. The Cherokee Nation of Oklahoma was provided notice of proceedings given that the children's father was of Indian descent.

In early November 2003, another permanency planning hearing was conducted, in which the goal was changed to termination of parental rights. The father was determined not to have maintained contact with the children and essentially to have abandoned them by moving to California in August 2003. The family services worker testified as to the father's abrupt departure and about the children's present status. She said that BN had improved her grades since being back in DHS custody and had a much improved attitude and emotional state. She affirmed that there were no services that could be offered to appellant that would not be repetitive of what she had received in the past. The main concern, she stated, was that BN and JN needed structure that they could not get with their mother and they needed to continue with the progress they had made with therapy and with care in foster homes. The case worker revealed that this family had received protective services beginning in 1999 through 2000 in Sebastian County, and Washington County eventually inherited the case when the children were taken into custody in the spring of 2001, until it was moved to Baxter County on appellant's move to Mountain Home. The family services worker opined that

termination of parental rights and moving toward adoption was the best option for BN and JN to give them permanency.

BN and JN's therapist, Jackie Scarborough, testified that she worked more extensively with JN. She said that JN's behavior immediately improved after being removed from his mother's trial placement and that he was doing well. She said that BN had a lot of anger and oppositional behavior in the past, but that had resolved with structure and therapy. BN and JN were able to see each other at therapeutic functions. As a therapist, Scarborough understood that BN did not want her parental ties to be severed, especially from her father, but Scarborough was unequivocal that termination was BN's best interest. Scarborough stated that neither parent had made any substantial progress to being the parents that these children required. Scarborough agreed that "on paper" appellant had done what was required by her case plan, but it was not enough because she could not provide the stability and structure long-term.

After hearing testimony, the trial court denied appellant's motion to reinstate the goal of reunification with her as it was against the best interests of the children. In late November 2003, DHS filed a petition for termination of parental rights as to BN and JN, as against the natural father and appellant, who was then living in Bentonville, Arkansas. DHS alleged that the children had been out of the home for more than a year and despite meaningful effort by DHS to rehabilitate the home, appellant had failed to remedy the conditions causing removal. Further, DHS alleged that other factors had arisen demonstrating that return of the juveniles was against their best interest and that appellant had demonstrated incapacity or indifference to remedy those factors, preventing return of the children. The attorney ad litem supported the petition filed by DHS.

The termination hearing was conducted in January 2004, when BN was twelve and JN was eight. A representative of the Cherokee Nation appeared and stated that the Indian group recommended termination of both parents' rights because the children's emotional and physical well being were at stake. The representative had met with appellant in her home, with KN, BN, and JN, and had reviewed the entire case file. He was familiar with BN's special needs and with JN's exceedingly special needs. During the hearing, appellant moved the trial judge to recuse on the basis that the judge's failure to ensure that a home study was done in the maternal grandfather's home showed prejudice against appellant. The judge stated that he was unaware of any failure on his part brought to his attention to warrant recusal and stated his duty to hear the case.

A social worker testified as to her work with BN, with the basic conclusion that during BN's trial placement with her mother, BN was trying to be the parent more than be parented. The social worker thought the trial placement did nothing but cause a regression in BN's depression and defiance. She recalled that in sessions appellant would complain about BN's behavior at home. The social worker said that she could not envision a scenario that would be a successful reunification of the three children at issue back into appellant's home because it remained chaotic. BN's primary therapist testified about BN's progress, and felt that appellant's intentions were good, but family progress just wasn't made. No one complained about the physical surroundings provided by appellant; the problem was with the emotional and psychological aspect of home life. A case worker testified that she would like to try to have BN and JN adopted together because they were emotionally bonded. An adoption specialist testified that there was a good probability to adopt them as a pair. Another case worker stated that she attempted to conduct the maternal grandfather home study in Missouri, but Missouri would not allow it.

Appellant testified that she had just started working part time as a waitress and was also in the midst of working in her own construction business. She said DN, who was then age seventeen, had come back to live with her and KN. She said she was in a twelve-step program, but was not taking any medications, except for anti-anxiety medication for being in court. She had been diagnosed with depression, ADD, and post-traumatic stress disorder, but was not in professional therapy. She said she had a good relationship in her home living with KN and wanted to be allowed to see her son JN. Appellant said she had learned a great deal about parenting and had done what was asked of her and was at a loss as to why she could not have all her children back. She said she could take care of them despite their being high maintenance. She agreed that she made a bad decision to leave the children with her ex-husband when he had been arrested on drug charges, but that was years ago. She believed she had learned and was capable of being the parent they needed with help. DN and KN testified in support of appellant's parenting ability.

In ruling from the bench, the trial judge stated that the case had been awkward due to the family members living in several counties over the course of the proceedings, and despite his belief that appellant loved her children, he was required to make a decision regarding permanency for BN and JN. The trial court found that BN had been out of the home for over two years, and JN had been out of the home for almost three years; both terms substantial periods in the children's lives. The trial court noted that trial placements of BN and JN in appellant's home were unsuccessful, despite extensive services by DHS to assist in reunification. Appellant essentially admitted in her testimony that BN and JN made significant progress in therapeutic foster care and that they should remain in those programs. However, appellant wanted to continue to work toward reunification in that setting. The trial judge found that this was contrary to BN and JN's best interests and contrary to their need

for permanency. The trial judge also found that DHS had proved beyond a reasonable doubt that it would be harmful to BN and JN's mental, emotional, and physical well-being to be returned to their mother and that the "limbo" would cease. The trial judge noted that DHS had made reasonable efforts with the mother until it was relieved of providing those services. The order noted that appellant's motion to have the trial judge recuse was denied. A formal order was entered commemorating these findings, and appellant filed a timely notice of appeal.

We first dispose of the argument raised by appellant that the trial judge was biased against her and should have recused. This case originated in Washington County in 2001 and was ultimately transferred to Baxter County in the fall of 2002 because appellant had moved to Baxter County. The Baxter County trial judge attempted to transfer the case to Sebastian County, where most of the relevant family members resided, but that transfer was never effected. It is the Baxter County Circuit Court order on appeal.

Appellant contends in her brief that the trial judge in Baxter County cut appellant off in her attempts to see her son JN and was not sensitive to appellant's conflict with JN's therapist. Appellant also points out that in the July 1, 2003, letter from the Baxter County judge to the judge in Sebastian County, the Baxter County judge described the only hope for the family as with the natural father, not appellant, showing bias against her from that point forward. Appellant also mentions that the trial judge did not enforce the order on DHS to do a home study on her father's residence. We disagree that appellant has demonstrated reversible error.

First, the bases for recusal regarding the letter and the trial court's purported attempts to "cut off" appellant regarding visitation were never brought forth to the trial court for consideration. This is a failure to preserve this aspect of the argument for appeal. *See*

Middleton v. Lockhart, __ Ark. __, __ S.W.3d __ (Oct. 20, 2005). Appellant's sole basis argued to the trial judge in Baxter County to recuse from this case came about in the January 2004 termination hearing wherein appellant complained that the judge had not required the Department of Human Services (DHS) to perform a home study on her father's residence, as was ordered in April 2003. The judge responded that there was no basis upon which to recuse because he thought the case should have been transferred to Sebastian County but was not, he was charged with the duty to hear the case, and he was prepared to hear the case to its finish. Furthermore, he stated that there was nothing brought to his attention that was left undone, and we note that a DHS worker testified that attempts to perform a home study in Missouri were not allowed.

A judge has a duty to sit on a case unless there is a valid reason to disqualify. *Walls v. State*, 341 Ark. 787, 20 S.W.3d 322 (2000). The decision to recuse is within the trial court's discretion and we will not reverse absent abuse. *Davis v. State*, 345 Ark. 161, 173, 44 S.W.3d 726, 733 (2001). Appellant must prove abuse of discretion by showing bias or prejudice. *Holder v. State*, 354 Ark. 364, 124 S.W.3d 439 (2003). The trial court enjoys a presumption of impartiality and the question of bias is usually confined to the conscience of the judge. *Id.* at 375, 124 S.W.3d at 447. To decide whether there has been an abuse of discretion, we review the record to see if prejudice or bias was exhibited, but the party seeking recusal must demonstrate bias. *See Dodson v. State*, __ Ark. __, __ S.W.3d __ (April 7, 2005). Further, unless there is an objective showing of bias, there must be a communication of bias from the court in order to require recusal for implied bias. *Id.* Without more than a bare claim that the failure to force DHS to perform a home study demonstrates bias and prejudice warranting recusal, we are hard pressed to hold reversible error in this discretionary decision. DHS offered an explanation why the study was not

performed, and there was no motion to compel such a study before the termination hearing. In light of the substantial deference to the trial court's discretion when the issue is recusal, and the absence of any showing of actual bias or prejudice, we affirm on this point.

To the merits of the termination order itself, we review termination of parental rights cases de novo. *Dinkins v. Ark. Dep't of Human Servs*., 344 Ark. 207, 40 S.W.3d 286 (2001). Termination of parental rights is an extreme remedy and in derogation of the natural rights of parents, but parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Id.* Grounds for termination of parental rights must be proven by clear and convincing evidence. *M.T. v. Ark. Dep't of Human Servs*., 58 Ark. App. 302, 952 S.W.2d 177 (1997). Clear and convincing evidence is that degree of proof that will produce in the fact finder a firm conviction as to the allegation sought to be established. *Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992). When the burden of proving a disputed fact is by clear and convincing evidence, the appellate inquiry is whether the trial court's finding that the disputed fact was proven by clear and convincing evidence is clearly erroneous. *J.T. v. Ark. Dep't of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997). We give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Id*. Where there are inconsistences in the testimony presented at a termination hearing, the resolution of those inconsistencies is best left to the trial judge, who heard and observed these witnesses first-hand. *Dinkins*, *supra*. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id*.

The goal of Arkansas Code Annotated section 9-27 341 (Supp. 2003) is to provide permanency in a minor child's life in circumstances in which returning the child to the family home is contrary to the minor's health, safety, or welfare and the evidence demonstrates that

a return to the home cannot be accomplished in a reasonable period of time as viewed from the minor child's perspective. Ark. Code Ann. § 9-27-341(a)(3). Parental rights may be terminated if clear and convincing evidence shows that it is in the child's best interest. Ark. Code Ann. § 9-27-341(b)(3). Additionally, one or more grounds must be shown by clear and convincing evidence. Arkansas Code Annotated section 9-27-341(b)(2)(A) provides the grounds upon which a termination of parental rights may be established.

Appellant does not dispute that BN and JN have been out the home for far longer than the requisite period of time, nor does she dispute that she and they needed assistance to learn how to effectively behave as a family. Her contention is that the trial judge clearly erred in terminating her parental rights where she had completed the case plan requirements set forth by DHS. Appellant asserts that the reason the children came into DHS custody was because she left them in their father's custody, at a time he was distributing drugs. She said that thereafter, she had complied with parenting classes, she had employment, and she had clear drug screens. Appellant argues that even though her youngest two children were "high maintenance" and hard to control, she could adequately care for them. The only failure on her part, she says, was her inability to communicate and work with JN's therapist due to the therapist's unprofessional conduct.

We are duty-bound to support the trial court's action that gives effect to the legislature's overriding intent, which is to protect the best interest of our state's children in achieving a safe and permanent home. Ark. Code Ann. § 9-27-341(a)(3). While appellant attempted to be the parent that her children needed, she was not able to be that parent. *See Camarillo-Cox v. Dep't of Human Servs.*__ Ark. __, __ S.W.3d __ (January 5, 2005) (children out of home for one year and four months, parent complied with case plan for the last five months); *Trout v. Dep't of Human Servs.*, __ Ark. __, __ S.W.3d __ (November 4,

2004) (out of home for more than two years, despite most of case plan goals being met, children needed permanency and consistent stability that parent could or would not provide); *Dinkins*, *supra* (more than two and a half years, similar holding). Appellant's own testimony at the termination hearing was that she was not ready to take JN and BN on full time without help. This is contrary to the overriding legislative directive to provide permanency for children where return to the home cannot be accomplished within a reasonable time. We affirm this point.

Appellant also contends that it is clearly erroneous to order termination of parental rights in this case in the absence of completion of a home study on appellant's father's home in Missouri, which was the basis for her motion to recuse. Appellant correctly states that one of the public policies served by the statutes concerning DHS and family services is to preserve the family unit. However, failure to complete this particular home study is an issue over which appellant has no standing to complain. The maternal grandfather never appeared in this case, and the evidence supported a finding that DHS attempted to complete the study but was thwarted from doing so. This argument does not establish a basis to reverse the findings of the trial court on termination.

Appellant's final contention is that the trial court clearly erred because it focused on the special needs of BN and JN instead of appellant's ability to parent. BN suffers from significant depression, and JN suffers from ADHD and post-traumatic stress disorder. Appellant argues that most of the severe problems are caused by separation from their mother and placement in foster homes. She asserts that though there were difficulties in the trial placements in her home, she was capable and willing to be the parent they needed.

To the contrary, the children's therapists specifically testified that appellant could not parent these children. Given any conflicts in the testimony, we would have to defer to the

trial court on that issue. *See Ark. Dep't of Human Servs. v. Couch*, 38 Ark. App. 165, 832 S.W.2d 265 (1992); *In Re Adoption of Milam*, 27 Ark. App. 100, 766 S.W.2d 944 (1989). Evidence that a parent begins to make improvement as termination becomes more imminent will not outweigh other evidence demonstrating a failure to comply and to remedy the situation that caused the children to be removed in the first place. *Compare Camarillo-Cox v. Ark. Dep't of Human Servs.*, __ Ark. __, __ S.W.3d __ (January 20, 2005).

In summary, we affirm the termination of appellant's parental rights to BN and JN.

PITTMAN, C.J., and BAKER, J., agree.